

In the Matter of Merchant Mariner's Document No. Z-990461 and all
other Licenses, Certificates and Documents
Issued to: WILLIAM L. MOSS

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

938

WILLIAM L. MOSS

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

By order dated 9 March 1956, an Examiner of the United States Coast Guard at New Orleans, Louisiana, revoked Merchant Mariner's Document No. Z-990461 issued to William L. Moss upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as an ordinary seaman on board the American SS NORMAN LYKES under authority of the document above described, on or about 7 January 1956, while said vessel was in a foreign port, he assaulted and battered a member of the crew, C.J. Fontenot, with a dangerous weapon, to wit: a steel bar.

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by counsel of his own choice and he entered a plea of "not guilty" to the charge and specification proffered against him.

The Investigating Officer made his opening statement. He then introduced in evidence the testimony of six members of the crew including the seaman allegedly assaulted by Appellant and an eyewitness named Shea who was an able seaman in the Deck Department.

In defense, Appellant offered in evidence his sworn testimony and that of eyewitness Adcock, another ordinary seaman. Appellant stated that the door was open when Fontenot walked three feet into the unlighted room without an invitation; Fontenot looked as though he had been drinking; Appellant saw a bladed instrument in Fontenot's hand as he raised his arm; Appellant jumped up, grabbed a bar and struck Fontenot; Appellant chased Fontenot thirty feet down the passageway but did not see the Third Mate at this time.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both

parties an opportunity to submit proposed findings and conclusions, the Examiner announced his decision and concluded that the charge and specification had been proved. He then entered the order revoking Appellant's Merchant Mariner's Document No. Z-990461 and all other licenses, certificates and documents issued to Appellant by the United States Coast Guard or its predecessor authority.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 6 and 7 January 1956, Appellant was serving as an ordinary seaman on board the American SS NORMAN LYKES and acting under authority of his Merchant Mariner's Document No. Z-990461 while the ship was at Medina, Mindanao Island, Philippines.

While ashore on the evening of 6 January, oiler Fontenot was in a barroom when he approached the table where two members of the Deck Department (Appellant and another ordinary seaman named Adcock) were sitting. Fontenot asked the two seaman if they were present at a fight between oiler Hatfield and able seaman Shea. Appellant and Adcock stated that they were not involved in the fight. Fontenot, a large man weighing about 228 pounds, then said that he was going to straighten out the Deck Department and left the table where Appellant was sitting. The latter is a much smaller man weighing approximately 126 pounds.

Fontenot returned to the ship about 2200 and slept until 2330 when he was awakened for his engine room watch commencing at midnight. Fontenot was sober and he properly performed his duties as oiler when he made his hourly round at 2400 and again at 0100. He then obtained permission from the Third Assistant Engineer to go to the head. Upon arriving on deck, Fontenot stopped and talked with the Third Mate who was in charge of the deck watch. Fontenot was returning to the engine room when he decided to eat some night lunch in the crew's messhall.

In the meanwhile, Appellant and Adcock had returned on board about 0100. They went to the room which was shared by Appellant, Shea and able seaman Burke. The latter two seamen were asleep but Shea awakened and remained in his bunk while talking with Appellant and Adcock. The overhead light had been turned on in the room and the door as left open.

Shortly after 0100, Fontenot was passing Appellant's room on his way to the messhall when he heard voices and looked in the room. Shea invited Fontenot to come into the room. Fontenot walked to a point about three feet inside the doorway when Appellant, who had been standing at a distance of ten feet from the

doorway, grabbed a fire hose rack retainer bar, ran toward Fontenot and struck him on the forehead with the three-foot long metal bar. Fontenot was not armed and he had not advanced any farther into the room or said anything before he was suddenly hit with the bar held by Appellant.

Fontenot left the room and ran down the passageway pursued by Appellant with the bar and by Adcock following Appellant. The Third Mate heard the noise and managed to stop Appellant and Adcock after they had chased Fontenot for a distance of approximately 25 or 30 feet along the passageway. The Third Mate took Fontenot to the Chief Mate's room for first aid treatment for the cut on his forehead. No other blows had been struck.

While the Chief Mate, Third Mate and Fontenot were in the Chief Mate's room; Shea entered. He stated that he had been accused of asking someone to come into his room and he wanted to deny having issued such an invitation. Fontenot had not voiced any such accusation and did not threaten Shea at this time. Fontenot was searched but a knife was not found on his person.

After Fontenot's wound was dressed and he returned to his watch, the Chief Mate and Third Mate went to the vicinity of Appellant's room. The metal bar and a fire hose nozzle were taken from the possession of Appellant and Adcock. It was evident to the two officers that both seamen were somewhat under the influence of intoxicants.

Later in the day, Fontenot was treated by a local physician. Two or three stitches were taken in the cut on Fontenot's sinciput and he was excused from duty for six days.

Appellant has no prior record.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Examiner: Appellant contends that the Examiner's decision is clearly contrary to the weight of the law and the evidence. All the witnesses testified in favor of Appellant except Fontenot. The latter's story is discredited by the fact that he is much larger than Appellant, he had made threats while ashore, and he had no reason to be in the vicinity of Appellant's room except to continue the trouble which he had started earlier. Appellant acted in self-defense in his own room. Although no one saw Appellant strike Fontenot, such conduct would have been justified. Appellant's spotless record and good reputation on board ship negate any vicious propensities on his part.

The Examiner's decision reflects his disbelief of testimony given by Appellant, Adcock and Shea without setting forth any criteria by means of which their credibility was judged. The Examiner seized upon one fragment of evidence to support his finding that Shea entered the Chief Mate's room to refute an accusation that Shea had invited Fontenot into the room shared by Appellant, Shea and Burke. The Examiner concluded from this that the accusation could have been made only by Appellant, Adcock or Burke and since Appellant and Adcock denied that there had been any such invitation (Burke said he was not awakened until Fontenot entered the room), then Shea's attempted refutation was based on his personal knowledge that Fontenot had been invited by Shea to enter the room so that the occupants could assault Fontenot. This led the Examiner to the further conclusion that Appellant, Adcock and Shea were not telling the truth when they denied that Fontenot had been invited into the room. But since Shea testified that the reason he went to the Chief Mate's room was to have Fontenot searched for a knife, the Examiner's reasoning was based on a false premise and he had no reason at all to reject the testimony of the three seamen.

After Shea entered the Chief Mate's room, Fontenot said that he had been invited into Appellant's room by Shea. The latter then denied the accusation. This is the only logical conclusion to be drawn from the evidence. Therefore, the Examiner's decision is based on conjecture and speculation.

Accordingly, it is urged that the Examiner's decision should be reversed and the order set aside.

APPEARANCE: Milton L. LeBlanc, Jr., Esquire, of New Orleans,
Louisiana, of Counsel.

OPINION

The above findings clearly establish proof of the specification, alleging assault and battery with a dangerous weapon, rather than presenting a case of self-defense as claimed by Appellant. Fontenot's earlier threat against the Deck Department and his mere presence in the room occupied by Appellant were not such provocation as to justify his conduct. 5 Corpus Juris 644. Fontenot cannot be considered to have been a trespasser by going through the unobstructed doorway upon invitation by one of the occupants. Even if Fontenot could be considered to have been a trespasser, in any sense of the word; Appellant was not justified in taking the initiative to such an extent, before requesting Fontenot to leave the room; nor did the disparity in size justify the use of a deadly weapon in the absence of any overt act of hostility by Fontenot. 5 Corpus Juris 746, 748-9. Nevertheless,

Fontenot's presence in the room was undoubtedly indiscreet in view of his prior threat against the Deck Department.

There are areas of agreement as well as disagreement in the testimony of the witnesses. Where there is conflicting testimony on material points, three of the members of the Deck Department (Appellant, Adcock and Shea) are usually in agreement while Fontenot's testimony is generally corroborated by that of the Chief Mate, Third Mate, Third Assistant Engineer and able seaman Burke.

There is no discord with respect to the following facts: the door to Appellant's room was open; Fontenot stopped at a point approximately three feet inside the doorway; Appellant struck Fontenot with the metal bar (Shea R. 39; Appellant chased Fontenot about 25 or 30 feet along the passageway.

In the area of disagreement, Appellant and his supporters contend that Appellant was sober but Fontenot was not; the overhead light in the room was not on; Fontenot was not invited into the room; he entered the room with an upraised knife in his hand while Appellant was sitting on the transom; and Appellant stopped pursuing Fontenot of his own accord rather than by the Third Mate.

The primary reason why my findings in these areas of conflicting testimony have been resolved against Appellant is that the Examiner who saw and heard the witnesses accepted the testimony of Fontenot as the truth and rejected much of the testimony given by Appellant, Adcock and Shea. The Examiner went into a detailed discussion, regarding his choice as to credibility, with respect to only one specific reason why he did not believe Appellant, Adcock and Shea. But it has been stated that a hearing examiner's findings based upon the credibility of a witness must be accepted by the agency "unless we can say that the corroboration of this lost evidence [the demeanor of the witness which may have been determined the examiner's choice between discordant versions of witnesses whom he has seen but which evidence is not brought before the court on appeal] could not have been enough to satisfy any doubts raised by the words; and it must be owned that few findings will not survive such a test." N.L.R.B. V. James Thompson Co. (C.A. 2, 1953), 208 F2d 743.

There is nothing illogical about the specific reason given by the Examiner for rejecting the testimony of Appellant, Adcock and Shea. These three seamen denied that Fontenot had been invited into the room. But the Examiner accepted both Fontenot's testimony that he had been issued an invitation by Shea and the corroborating testimony of the Chief Mated that Shea entered the Chief Mate's room to deny an alleged accusation of having invited Fontenot into the room. Silence the Chief Mate also testified that Fontenot had

made no such accusation, there was nothing to deny unless there had been such an invitation and Shea was attempting to cover up the fact by a vehement denial. Hence, the denials, by the three seamen, concerning the invitation cast a shadow over their testimony concerning the other points of conflicting testimony.

There are other considerations which lead to the conclusion that Fontenot's testimony was true. His testimony was corroborated in many respects. The Third Assistant Engineer stated that Fontenot as sober; the Chief Mate and Third Mate controverted the testimony that Appellant was in the same condition as Fontenot. Burke supported Fontenot's claim that the light in the room was turned on when he entered. The Third Mate testified that he was instrumental in stopping Appellant while he was chasing Fontenot. The fact that the Third Mate did not observe Fontenot with a knife and none as found on his person supports Fontenot's testimony that he did not have a knife when he entered the room. This fact must have been clear to Appellant since the light was on in the room.

In addition to pursuing Fontenot beyond the confines of the room rather than locking the door, Appellant indicated that he was confident that the bar more than offset Fontenot's 100 pound weight advantage by remaining in the room with the door open and the bar nearby prior to Fontenot's appearance. Also, it does not seem logical that Fontenot would have stopped a short distance inside the doorway if he had been intent on attacking Appellant. All the eyewitnesses agree that Fontenot stopped and Appellant advanced about 7 feet toward Fontenot with the bar.

Although these factors are not mentioned in the Examiner's decision, they lend support to the acceptance of the version presented by Fontenot as substantially set forth in my above findings of fact. It has been held that the trial judge's findings as to the credibility of witnesses will be accepted unless he reveals of record that an irrational test of credibility was used. Broadcast Music, Inc. V. Havana Madrid Restaurant Corp. (1949), 175 F2d 77.

With respect to the Investigating Officer's attempt to impeach his own witness Shea, it is noted that it has been held that it is within the sound discretion of the court to permit cross-examination of one's own unfriendly witness where such cross-examination is helpful in ascertaining the truth concerning the issues being tried. Illinois Terminal R. Co. V. Friedman (C.A. 8, 1954), 210 F2d 229; Fields V. United States (C.A.D.C., 1947), 164 F2d 97; Chicago and N.W. Ry. Co. V. Kelly (C.C.A. 8, 1936), 84 F2d 569. Aside from the latter cases cited, there is no doubt that the Investigating Officer could have requested the Examiner, on his own motion, to call Shea as a necessary witness to bring out all

the relevant and material facts. 46 CFR 137.09-5(a). If this procedure had been followed, either party could have cross-examined Shea for the purpose of impeachment. See Wigmore on Evidence, 3d Ed., secs 910, 918; Litsinger V. United States (C.C.A. 7, 1930), 44 F2d 45; 46 CFR 137.09-5(b). Hence, the end result would have been the same as the Investigating Officer calling Shea as was done herein.

For the above reasons, it is my opinion that there is no basis for Appellant's contentions that the Examiner's decision is contrary to the weight of the law and the evidence, and that it is based on conjecture and speculation.

In view of this conclusion, the order of revocation will be sustained because of the serious nature of this offense involving violence on board ship which might well have results in much more serious injury to Fontenot.

ORDER

The order of the Examiner dated at New Orleans, Louisiana, on 9 March 1956, is AFFIRMED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D.C., this 30th day of November, 1956.